TANG KWOR HAM & ORS

v.

PENGURUSAN DANAHARTA NASIONAL BHD & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[NO: 13-2-2002]
25 JUNE 2003

COMPANY LAW: *Derivative action - Representative and derivative action - Whether properly initiated - Whether application misconceived as applicants are majority shareholders - Whether derivative action only maintainable in respect of enforcement of private law remedy - Judicial review - Whether subject matter amenable to judicial review - Whether first respondent a public authority under O. 53 r. 2(4) of the Rules of the High Court 1980 - Failure to establish arguable case - Whether application dismissed - Pengurusan Danaharta Nasional Berhad Act 1998, ss. 30, 33, 44(1), 66(2), para. 8 to the second schedule - Rules of the High Court 1980, O. 53 r. 3(1) & (2)*

ADMINISTRATIVE LAW: *Judicial review - Application for - Alleged procedural impropriety - Whether subject matter amenable to judicial review - Whether judicial review only applicable to matters relating to public law - Whether first respondent a public authority under O. 53 r.2(4) of the Rules of the High Court 1980 - Failure to establish arguable case - Whether application dismissed - Pengurusan Danaharta Nasional Berhad Act 1998, ss. 30, 33, 44(1), 66(2), para. 8 to the second schedule - Rules of the High Court 1980, O. 53 r. 3(1) & (2)*

This was an application by the three applicants on behalf of themselves and also by way of a representative and derivative action on behalf of the company, seeking for leave for judicial review of the workout proposal prepared by the second, third and fourth respondents ('special administrators') for the company and for a stay of implementation of the said workout proposal until the adjudication of the judicial review. The applicants submitted that the said workout proposal was put forward as an expeditious settlement of liabilities due by the company and to provide a maximum level of settlement to creditors. Further, the applicants claimed that the workout proposal was prepared without giving them a chance of an appropriate hearing, thereby occasioning a procedural impropriety. The said workout proposal did not fall under s. 44(1) of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act') and was an attempt to comprehensively shield the special administrators from

liabilities, thus contravening the exception to s. 66(2) of the Danaharta Act. The respondents objected to the application and contended that there was an absence of an arguable case for leave to issue and hence it would be an exercise in futility.

The issues that arose before the court were: (1) whether the applicants' application by way of a representative and derivative action was wrongly or improperly initiated as they were majority shareholders of the company and that a derivative action was only maintainable in respect of the enforcement of a private remedy law, and not in public law; (2) whether the first respondent was a "public authority" envisaged by O. 53 r. 2(4) of the Rules of the High Court 1980 ('the Rules'); and (3) whether there was an arguable case.

Held:

[1] The authorities on derivative action have been decided in the context of corporate matters and the remedies sought therein were private remedies, which are dissimilar from the instant case. Hence, there was no support garnered by the applicants in commencing this derivative action for the purpose of seeking public law remedies by way of judicial review under O. 53 of the Rules and the application herein could be dismissed on this ground alone. (p 213 f-g)

[2] The workout proposal did not come within the purview of the decision of a 'public authority' in O. 53 r. 2(4) of the Rules but concerned commercial transactions made by persons and bodies who are private entities. The infusion of public element and public interest in the Danaharta Act does not *ipso facto* make it a decision of a public authority. (p 215 e-f)

[3] The applicants have failed to discharge the burden of establishing an arguable case, based on the affidavits and statements filed by the applicants under O. 53 r. 3(1) and (2) of the Rules. Hence, there was no arguable case in this application for judicial review. (p 215 g-h)

[Application dismissed with costs.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Edwards v. Halliwell [1950] 2 All ER 1064 ***(refd)***

Foss v. Harbottle [1843] 67 ER 189 ***(foll)***

Ganda Oil Industries Sdn Bhd & Ors v. Kuala Lumpur Commodity Exchange & Anor [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56 SC ***(refd)***

OSK & Partners Sdn v. Tengku Noone Aziz Tengku Mahmood & Anor [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 FC ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries (No 2) [1980] 2 All ER 841 ***(foll)***

Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(foll)***

Ting Chong Maa v. Chor Sek Choon [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572 HC ***(foll)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v. Seow Boon Cheng & Anor [2001] 6 CLJ 190 HC ***(refd)***

Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors [2003] 5 CLJ 205 HC ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 4, 132C(1)

Pengurusan Danaharta Nasional Berhad Act 1998, ss. 22(2), 24, 26(2), 30, 32, 33(4), 36(4), 37(6), 38(4), 39(3), 39A, 44(1), 66(2)

Rules of the High Court 1980, O. 15 r. 12, O. 53 rr. 2(4), 3(2)

For the applicants - Lim Whei Chun; M/s Lim Whei Chun
For the A-G - Mary Lim Thiam Suan SFC
For the 1st respondent - Jeyanthini Kannaperan; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (11) by three applicants, on behalf of themselves and also by way of representative and derivative action on behalf of Tan Kwor Ham Realty Sdn. Bhd., ("the company") for the following orders:

1. under O. 53 r. 3 of the Rules of the High Court 1980, leave for judicial review of the Workout Proposal prepared by the second, third and fourth respondents ("Special Administrators") for the company ("Workout Proposal");

(The orders and rules referred to hereinafter shall be the orders and rules of the Rules of the High Court 1980)

2. under O. 53 r. 3(2), a stay of the implemenation of the Workout Proposal until the adjudication of this judicial review; and

3. costs be borne by the respondents.

For the purposes of this application, the workout proposal includes its submission by the special administrators to the first respondent, the independent advice report dated 12 September 2002 prepared by the fifth respondent, Danaharta's approval, third respondent's notice of meeting dated 19 September 2002 and the approval by a majority of the second creditors at a meeting on 27 September 2002.

Factual Background

The first and second applicants are shareholders of the company, each holding 25% of the shares therein, while the third applicant, another shareholder, holds 10%. They are three of the four directors in the company.

The first respondent is a company ("Danaharta") incorporated under the Companies Act 1965 while the special administrators were appointed under s. 24 of the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Danaharta Act").

The fifth respondent is an independent adviser appointed by the first respondent under s. 26(2) of the Danaharta Act.

The applicants brought this representative and derivative action on the grounds:

(i) of the Special Administrators' monopoly in the right to sue in the name of the company pursuant to s. 30 read with s. 33 and para 8 of the Second Schedule to the Danaharta Act and art. 70 of the company's articles of association; and

(ii) that the special administrators, being the entities perpetrating the proceedings which injure the company, would not allow this application to be brought in the name of the company.

The applicants had cited the company as a nominal respondent in order to bind it.

The applicants claim that the workout proposal is infused with much public element in that:

1. the Danaharta Act is a public interest statute;

2. Danaharta is owned by the Minister of Finance Incorporated: s. 9 of the Danaharta Act;

3. Danaharta's directors are appointed by the Minister of Finance Incorporated and two of them are Federal Government officials: s. 5(1) of the Danaharta Act;

4. Danaharta is overseen by the Oversight Committee consisting of representatives of public authorities: s. 22(2) of the Danaharta Act; and

5. the special administrators' roles are assisted by threats of penal sanctions:

ss. 33(4), 36(4), 37(6), 38(4), 39(3) and 39A of the Danaharta Act.

The company has a non performing loan (NPL) of approximately RM26 million pursuant to credit facilities granted by lenders and this NPL was acquired by Danaharta on 30 December 1998 under the Danaharta Act and a vesting certificate.

The workout proposal recommended the sale of the land and property held under Lot 159, Kawasan Bandar VIII, Daerah Melaka Tengah ("the subject land") at RM7,600,000, but the applicants claimed that its correct value was not less than RM15,000,000, as they said there were other offers to purchase the subject land in the last quarter of 2001 at RM15,000,000.

The applicants further claimed that they only knew of the workout proposal in September 2002 and were not given the opportunity to air their grouses at the secured creditors meeting which approved the workout proposal.

The subject land together with the Grand Hill Hotel, office building and warehouse erected thereon, was first put up for sale by the Special Administrators in tender exercises carried out from 13 October 2000 to 15 November 2000 and 14 February 2001 to 28 February 2001. However, no offer was received.

In the final attempt to sell, invitation to interested parties to make their bids was issued. Three offers were received, the highest being RM7,600,000 was accepted.

Upon receipt of the offer, the special administrators wrote to the applicants on 12 November 2001. The applicants by letter dated 19 November 2001 introduced a purchaser ie, Merchant Credit Sdn Bhd for the subject land at RM7,800,000.

The applicants' purchaser could not pay the necessary deposit of RM250,000 for their offer to be considered, but was only able to pay RM78,000 and required time to pay the balance. The special administrator rejected the same and accepted the offer at RM7,600,000.

Given the above scenario, the workout proposal was put forward as an expeditious settlement of liabilities due by the company and to provide a maximum level of settlement to creditors.

Applicants' Grounds

En. Lim Whei Chun, learned counsel for the applicants, submitted that the workout proposal was prepared without giving the applicants a chance of appropriate hearing, thereby occasioning a procedural impropriety.

He contended that the workout proposal was not a proposal under s. 44(1) of the Danaharta Act that set forth the special administrators' plan with respect to the company but attempted to comprehensively shield them from liabilities and thus contravened the exception to s. 66(2) of the Danaharta Act and hence an illegality.

It was argued that the special administrators having assumed all authority of the sixth respondent's board of directors under ss. 30 and 33 and the Second Schedule to the Danaharta Act, the special administrators were themselves directors within the meaning of "director" in ss. 4 and 132C of the Companies Act 1965.

He stressed that the transaction under the sale and purchase agreement dated 18 April 2002 entered into, purportedly on behalf of the company, by the third respondent is a transaction for the disposal of a substantial portion of the company's undertaking or property, which would materially and adversely affect the company's financial position under s. 132C(1) of the Companies Act 1965; and that since the transaction was never approved by the general meeting of the company, the said sale and purchase agreement and consequently the workout proposal is an illegality.

He canvassed that the report of the independent advisor being based wholly on materials submitted by the special administrators to the exclusion of the applicants, is one-sided, not independent and an illegality.

Respondents' Contention

In objecting to the application herein, Dato' Mary Lim Thiam Suan, learned senior federal counsel appearing for the learned Attorney General, and Cik Jeyanthini Kannaperan, learned counsel for the first respondent, took a common stand.

In essence, it was contended that the motion by way of representative and derivative action is wrongly or improperly initiated by the applicants who are the majority shareholders as they together hold 60% interest in the company, and that a derivative action is maintainable in respect of an enforcement of a private law remedy and not in public law.

Secondly, they argued that the subject matter sought to be reviewed is not amenable to judicial review as the respondents do not come within the meaning of "public authority" in O. 53 r. 2(4) as one has to look at the source rather than the character of the power.

The third and final point relates to the absence of an arguable case for leave to issue and hence it would be an exercise in futility.

Decision Of Court

Learned counsel for the applicants has expended inexhaustible energy and effort in preparing and presenting volumes of submissions and authorities. While I wish to place on record my commendation for his diligence, I am of the view that there is no necessity nor justification for me to refer to all of them as I have to separate the wheat from the chaff.

Authorities cited by the parties herein are referred to whenever necessary.

Representative And Derivative Action

While a representative action is regulated by O. 15 r. 2, a derivative action is not specifically provided in the rules. Nevertheless, it is in a sense a representative action and O. 15 r. 2 may be invoked in appropriate cases.

Generally, the rule in *Foss v. Harbottle* [1843] 67 ER 189 established that:

> If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting have no *locus standi* to bring an action to remedy a wrong done to a company.

However, there are five exceptions to the above rule whereby a minority shareholder may be a plaintiff *viz*:

(1) *ultra vires* acts;

(2) fraud on the minority;

(3) special majorities ie, when something is done by a simple majority where a special majority is required by the Act or the articles;

(4) personal rights ie, where a member is suing to enforce his own rather than the company's rights; and

(5) where the justice of the case requires.

(see *Tan Guan Eng & Anor. v. Ng Kweng Hee & Ors.* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74, per Edgar Joseph Jr, J (later FCJ) following *Edwards v. Halliwell* [1950] 2 All ER 1064).

In *Abdul Rahim bin Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn. Bhd. & 5 Ors.* [1995] 4 CLJ 551 our Court of Appeal through the judgment of Gopal Sri Ram JCA explained as follows:

> ... derivative action; an ingenious procedural device created by Court of equity by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company ...

While a derivative action is intended to protect the rights of minority shareholders, (see eg, *United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v. Seow Boon Cheng & Anor* [2001] 6 CLJ 190 HC) it appears that the test of its applicability is to be found in the element of control particularly *de facto* control over the litigation machinery of the company.

In *Ting Chong Maa v. Chor Sek Choon* [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572, the plaintiff was a shareholder while the defendant was the managing director of a company, in which both of them held equal equity. On a claim by the plaintiff for accounts and enquiries of secret profits which the defendant had obtained from their company, the defendant applied to strike out the plaintiff's claim on the ground that the plaintiff did not have *locus standi*.

Peh Swee Chin J (later FCJ) held that the plaintiff although not a minority shareholder had *locus standi* to bring the claim for the benefit of the company as the defendant, the alleged wrongdoer, was in control of their company. The learned judge was of the view that the majority or minority shareholding was not a conclusive test but control, including *de facto* control, is.

In *Prudential Assurance Co. Ltd. v. Newman Industries (No. 2)* [1980] 2 All ER 841, a wider approach to the determination of control was suggested by Vinelott J that there would be an exception to the rule in *Foss v. Harbottle, supra,* if it could be shown that the wrongdoers were able "by means of manipulation of their position in the company" to ensure that the action is not brought by the company.

This was cited with approval by Edgar Joseph Jr. J (later FCJ) in *Tan Eng Guan, supra,* who added that the traditional view of "control" was based on ownership of shares but here is a new view of control – as to who has *de facto* control of the company.

I am in complete concurrence with the decisions of Peh Swee Chin J (later FCJ), Vinelott J and Edgar Joseph Jr. J (later FCJ) who have consistently adopted the new view of *de facto* control, in order to enable the shareholders, be they minority, equal or majority shareholders, to bring themselves within the exceptions to the rule in *Foss v. Harbottle, supra,* and hence the necessary *locus standi* to maintain an action against the company and the wrongdoers in control of the company.

Be that as it may, I find considerable merit in the submission on behalf of the learned Attorney General to the effect that these authorities on derivative action have been decided in the context of corporate matters and the remedies sought therein were private remedies which are quite dissimilar from the instant case which focuses on remedies in public law.

In the circumstances, I am unable to see any support that may be garnered by the applicants in commencing this derivative action for the purpose of seeking public law remedies by way of judicial review under O. 53, and the application herein could be dismissed on this ground alone.

Nevertheless, quite apart from the derivative action, as an alternative, the applicants are also maintaining this application on behalf of themselves. I shall therefore proceed to deal with it as an action in their personal capacity against the respondents, and hence consider the issues of whether the respondents are public authorities under O. 53 r. 2(4), and whether there is an arguable case.

Public Authority

The procedural law upon which the applicants sought reliance is essentially O. 53 r. 2(4) which merits reproduction as follows:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

The crucial question for determination by me is whether the workout proposal was a decision of a "public authority" within the purview of O. 53 r. 2(4).

Some authorities have been brought to my attention to assist me in arriving at an answer here.

In *O.S.K. & Partners Sdn. v. Tengku Noone Aziz Tengku Mahmood & Anor.* [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 FC, which was cited for the applicants, the core questions were:

(1) How far can the long arm of *certiorari* reach? and

(2) To whom can it extend?

The facts there revealed that the appellant was a stockbroker carrying on business as a member of the Kuala Lumpur Stock Exchange (KLSE) and was fined RM5,000 by KLSE for breaches of certain KLSE Rules. The appellant claimed that the decision of KLSE had been made in excess of jurisdiction, contrary to natural justice and wrong application of the rules. The High Court held that KLSE was not a body against which *certiorari* would lie, but the Federal Court thought otherwise, as there was an exercise of disciplinary powers leading to the imposition of a fine.

In *Ganda Oil Industries Sdn. Bhd. & Ors. v. Kuala Lumpur Commodity Exchange & Anor.* [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56, cited for the respondents, the appellants applied for *certiorari*, on grounds of excess of jurisdiction and bad faith, in order to quash the decision of KLCE fixing crude palm oil price at RM1,350 per metric ton in respect of 617 lots purchased by the appellants on the floor of KLCE. The dismissal of the application by the High Court was affirmed by the then Supreme Court on appeal, on the ground that the parties' relationship was contractual and the decision of KLCE to fix the price was by its nature not amenable to judicial review.

Having considered these two authorities, I agree with the learned senior federal counsel that they were decided before the amendment to O. 53 *vide* PU(A) 342/2000 which came into force on 22 September 2000, and the instant application has to be determined by reference to the provisions of O. 53 r. 2(4), which touches and concerns the source rather than the character of the power.

Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors [2003] 5 CLJ 205 is a decision which has a direct bearing on the ambit of the expression "public authority" in O. 53 r. 2(4). The facts there are strikingly similar to those in the instant application and I would not risk a repetition here.

On the applicant's application for, *inter alia*, an order of *certiorari* to quash the various decisions of the special administrators, Faiza Tamby Chik J held that the first respondent being a limited company incorporated under the Companies Act 1965 is a private entity and not a public authority and that the special administrators are deemed in law as its agents under s. 32 of the Danaharta Act. All the decisions of the respondents were held to be the decisions of a private entity ie, a business entity in the field of "private law" in accordance with the spirit of "freedom of contract" and certainly did not have the character of public law, in which case they were not and should not be subject to judicial review.

I am in entire agreement with the judgment of Faiza Tamby Chik J and hereby apply it to the facts of this application, and arrive at the same conclusion that the workout proposal does not come within the purview of the decision of a "public authority" in O. 53 r. 2(4); but concerns commercial transactions made by persons and bodies who are private entities.

The infusion of public element and public interest in the Danaharta Act does not *ipso facto* make it a decision of a public authority.

No Arguable Case

Finally, to succeed in obtaining leave in this application, the applicants bear the burden of establishing an arguable case, and the question as to whether the applicants have discharged that burden is to be decided by reference to the affidavits and statements filed by the applicants under O. 53 r. 3(1) and (2).

In my view, having regard to the factual background as alluded to above, as apparent from the affidavits and statement of the applicants, I hold that in relation to this application for judicial review, there is no arguable case: see *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 SC;

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725; *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC.

Conclusion

In the light of the foregoing grounds, the inevitable result is that this application fails and is hereby dismissed with costs.